STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2009
v DANIEL JOSEPH FLORANCE, JR., Defendant-Appellant.	No. 283713 Monroe Circuit Court LC No. 07-036206-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DANIEL JOSEPH FLORANCE, JR., Defendant-Appellant.	No. 283714 Monroe Circuit Court LC No. 07-036209-FH

Before: Servitto, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), and sentenced as an habitual offender, second offense, MCL 769.10, to concurrent terms of 28 months to 30 years' imprisonment for each conviction.[1] He appeals as of right. We affirm.

In conjunction with the Office of Monroe Narcotics Investigations (OMNI), informant Ron Salkey arranged two separate drug transactions with defendant. Salkey, who lived across the hall from defendant, had contacted OMNI and indicated that he could purchase cocaine from defendant. On February 27, 2006, OMNI officers set up

[1] Defendant was charged with one count of delivery of cocaine in each of two separate files, which were consolidated for trial.

surveillance outside defendant and Salkey's apartment building, and Corporal John Schiappacasse gave Salkey $140 to purchase cocaine from defendant. Salkey testified that he knocked on defendant's door, defendant answered, and Salkey gave defendant the money. In turn, defendant left and returned minutes later with a plastic bag of cocaine, which Salkey turned over to the police. Schiappacasse testified that from his position down the hall, he saw Salkey knock on defendant's door, defendant come out of the apartment, and defendant and Salkey subsequently exchange items. Schiappacasse explained that although he was not close enough to see the actual items exchanged, he concluded, based on his training and experience, that the items exchanged were the money and the cocaine.

For the second transaction, which took place on July 27, 2006, Salkey arranged a deal with defendant via cell phone while in Detective John Flora's presence. Defendant was not at home, so Salkey agreed to meet defendant in a parking lot that defendant designated. Flora and Salkey drove to the meeting place in Flora's truck. Both Flora and Salkey testified that after they arrived at the meeting place, defendant exited a white vehicle, walked up to the driver's side of Flora's truck, and briefly spoke with Flora. Flora then gave defendant $160 for the purchase of an "eight-ball of cocaine." After leaving for a few minutes, defendant returned, went to the passenger side of the vehicle, and gave Salkey a plastic bag containing cocaine. Schiappacasse, who was on the surveillance team for this transaction, identified defendant as the person who was at the driver's side of Flora's truck. Detective Chris Miller, who was positioned on the surveillance team as "the eye," also identified defendant as the person involved in the drug transaction.

On appeal, defendant argues that the verdict was against the great weight of the evidence, because the testimony presented by the prosecution's witnesses was not credible. We disagree. We review a trial court's decision denying a motion for a new trial on the ground that the verdict was against the great weight of the evidence for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Horn*, 279 Mich App 31, 41 n 4; 755 NW2d 212 (2008). "A verdict may be vacated only when it 'does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence.'" *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted). Absent compelling circumstances, the credibility of witnesses is for the jury to determine. See *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998). "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*. at 645-646 (citation omitted).

In support of his argument that the witnesses were inherently not credible, defendant asserts that Salkey "is a known drug addict with a long history of crimes

including crimes of dishonesty," and that the "officers who claimed to identify [him] were not truly in a position to make a solid identification." However, defendant presented his credibility arguments to the jury, and there is nothing in the record to warrant the unusual step of overriding the jury's credibility determinations. Indeed, the jury was aware of Salkey's drug use and prior convictions. Further, there is no support for defendant's argument that the officers' identification testimony was implausible. With regard to the first transaction, although Schiappacasse was down the hall, he testified that he could see that Salkey knocked on defendant's apartment door, that defendant came out, and that Salkey and defendant exchanged items. Schiappacasse's testimony is strengthened by the fact that the transaction occurred in the doorway of *defendant's* apartment. With regard to the second transaction, Flora and defendant had a face-to-face conversation in the daylight and Flora handed defendant the money, thus providing Flora with an ample opportunity in optimal conditions to observe defendant. In addition, the OMNI supervisor testified at trial and explained that Miller was strategically situated as "the eye" for the second transaction, and Miller indicated that he could identify defendant from his position. The evidence does not clearly preponderate so heavily against the verdict that a miscarriage of justice would result if the verdict were allowed to stand.

Next, defendant argues that he was denied a fair trial when the prosecutor made comments and elicited testimony from police witnesses that placed his criminal history before the jury. We disagree. Because defendant failed to challenge the prosecutor's remarks and questioning of Schiappacasse, this issue is unpreserved. We review unpreserved claims for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We will not reverse if the alleged prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant argues that in his opening statement, closing argument, and during the questioning of Schiappacasse, the prosecutor used Schiappacasse's prior knowledge of defendant to improperly place "bad acts" before the jury. In his opening statement, the prosecutor stated that Schiappacasse followed Salkey into the apartment building,

> where he kind of kept an eye on things and watched. Officer Schiappacasse was familiar with the Defendant, had known him for several years, was able to recognize him immediately when he came out into the hallway and he saw the exchange take place.

During the prosecutor's direct examination of Schiappacasse, the following exchange occurred:

> *Q*. Okay. And, specifically, on February 27th of 2006, were you involved in—in an investigation that surrounded Daniel Florance?
>
> *A*. I was.
>
> *Q*. Did you know Mr. Florance before that date?

A. I did.

Q. How long had you know him?

A. Several years.

Q. Okay. Did you recognize him?

A. I did.

Q. Knew what he looked like?

A. Yes.

In closing argument, the prosecutor stated:

> [Schiappacasse] went in the building with . . . the informant and waited down the hallway. Now, he knew who the Defendant was. He had known him for years and rec—and told you that he recognized who it was. In addition to that, Mr. Salkey knew who he was. He had lived right across the hall from—from him.

The prosecutor's questions were designed to establish how Schiappacasse was able to recognize defendant from his positions during both drug transactions, and they were relevant to Schiappacasse's identification of defendant at trial. The prosecutor did not elicit, nor did Schiappacasse volunteer, any information disclosing the nature of Schiappacasse's prior knowledge of defendant. In fact, during defendant's motion for a new trial, the trial court noted that Schiappacasse testified that he had been in the unit only since 2006, yet testified that he had known defendant for several years, thereby supporting a "perfectly innocent conclusion" that the officer's knowledge of defendant was "outside his capacity as a police officer." The substance of Schiappacasse's testimony was that he knew defendant, thus enabling him to recognize him when he saw him during the transactions, which was not improper. Consequently, the testimony did not constitute plain error.

Because the evidence was not improper, the prosecutor did not engage in misconduct by referring to that evidence during opening statement and closing argument. "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976), aff'd 405 Mich 38 (1979). In closing argument, the prosecutor was free to argue the evidence and all reasonable inferences arising from it as they related to his theory of the case. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant also argues that during the prosecutor's direct examination of Flora, the officer improperly referred to defendant's "mug shot," which was irrelevant, prejudicial, and denied him his right to a fair trial. To support his argument, defendant cites only Flora's reference to his "mug shot." However, a complete review of the record

shows that defendant's right to a fair trial was protected when defense counsel objected and the trial court addressed this matter. The relevant exchange is as follows:

> *Q*: Okay. And—And when did you first see the Defendant?
>
> *A*. When he existed the—It was a white vehicle . . . .
>
> *Q*. Okay. And how did you recognize him?
>
> *A*. Well, I had looked at a booking photo—Or, I'm sorry, a—just a photo of him from our previous dealings and before I went to do this controlled purchase I looked at a photo—

Defense counsel objected and, outside the presence of the jury, moved for a mistrial. The trial court denied the motion, but gave the following curative instruction:

> You may recall that this witness made some reference to identifying the Defendant from some type of photo. If you heard the word—anything other than photo, you're to disregard it. He simply corrected himself, indicating the he identified the Defendant from a photograph.

There were no repeated references to the matter. In its final instructions, the court instructed the jury that it was to decide the case based only on the properly admitted evidence and that it was required to follow the court's instructions. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Consequently, defendant is not entitled to a new trial on the basis of prosecutorial misconduct.

We reject defendant's alternative argument that defense counsel was ineffective for failing to challenge the prosecutor's questioning of Schiappacasse or to the related remarks in his opening statement and closing argument. Because defendant has failed to establish that the remarks or questions were improper, his claim of ineffective assistance of counsel cannot succeed. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). We also reject defendant's argument that defense counsel should have further challenged Flora's use of the term "previous dealings" while referring to the booking photo. Because the trial court's instructions adequately protected defendant's rights in that regard, defendant cannot demonstrate a reasonable probability that, but for counsel's failure to further object, the result of the proceeding would have been different. *Effinger*, *supra* at 69. Defendant is not entitled to a new trial.

Affirmed.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra